Filed 7/16/20 P. v. Romero CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS ROMERO, Defendant and Appellant.	A156660 (Alameda County Super. Ct. No. 150192)

Defendant Carlos Romero was convicted, following a bench trial, of first-degree robbery in concert (Pen. Code, §§ 211, 213, subd. (a)(1)(A))[1] and carjacking (§ 215, subd. (a)). He contends the evidence was insufficient to support the carjacking conviction. He further contends, and the Attorney General concedes, Senate Bill No. 136 (2019–2020 Reg. Sess.) applies retroactively and therefore prior prison term enhancements must be stricken under section 667.5, subdivision (b) as amended.

We conclude substantial evidence supports the carjacking conviction, and we agree the two prior prison term enhancements must be stricken. We otherwise affirm the conviction.

[1] All further statutory references are to the Penal Code.

BACKGROUND

The victim, B.L., was preparing dinner when she heard a knock at her door and her doorbell ring. She inquired who was at the door, and two male voices responded, " 'We have a package for you.' " She was expecting a package and opened the door.

When she did so, she saw two men holding a small package. However, when she reached for the package, one of the men (Man 1) pushed her to the floor, while the other (Man 2) closed the door.[2] She noticed one of the men had a gun. Man 2 inspected the home, as Man 1 questioned B.L.

Man 1 then removed the belt from B.L.'s robe and tied her hands behind her back. Both men forced her to go upstairs and lie face-down in the hallway. She noticed one of the men had a goatee. Subsequently, Man 1 instructed Man 2 to place a pillowcase over her head.

B.L. was able to untie herself and ran back downstairs, reaching the front door. However, both men caught up with her, pushed her against the door and then threw her to the floor. One of them hit her at least "two or three times." The men then tied her hands and feet and dragged her to the living room.

At that point, Man 1 asked B.L. if she had a car. She told them she did, and it was in the garage (which was on the ground floor and could be accessed through an unlocked door in the kitchen). After inspecting the car, Man 1 asked for the keys. B.L. responded the keys were in the middle console of the car. Both men then carried items from the bedrooms to the garage.

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[2] While DNA established defendant was one of the two men, neither it nor any other evidence established whether defendant was Man 1 or Man 2.

Once they loaded the car, Man 1 instructed Man 2 to tie B.L. to a pole. Man 2 first tried to tie her to the stair railing. When that failed, he tied her to the refrigerator with an extension cord. Then, Man 1 placed a sock in her mouth and "punched [her] a few times" in the face. In fear of her life, B.L. pretended to be unconscious.

Prior to leaving, one of the men spit in the sink.[3] Five minutes later, Man 1 exited in B.L.'s car through the garage. Subsequently, Man 2 exited through the front door.

B.L. was able to free herself and ran to a neighbor's house, where they called the police.

Defendant was charged with kidnapping to commit robbery (§ 209, subd. (b)(1); count one), first degree residential robbery in concert (§§ 211, 213, subd. (a)(1)(A); count two) and carjacking (§ 215, subd. (a); count three). The court found him guilty of counts two and three. It subsequently reduced the robbery in concert charge to residential robbery (§§ 211, 212.5, subd. (a)). The court imposed a total prison term of 28 years (18 years for carjacking, three years and eight months for residential robbery which was stayed, plus a three-year enhancement for infliction of great bodily injury, five years of enhancements for prior serious felony convictions, and two years of enhancements for prior prison terms).

[3] This expectoration yielded the DNA by which defendant was identified.

DICUSSION

Substantial Evidence[4]

Defendant maintains there was insufficient evidence (a) that he took B.L.'s car from her "person or immediate presence" and (b) that "force or fear" was necessary to take the vehicle.

" 'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).)

"Immediate Presence"

Defendant asserts there was no substantial evidence he took the car from B.L.'s "immediate presence" because both the car and keys were in the garage at the time of the robbery, whereas B.L. was in the house.

The "immediate presence" requirement in the carjacking statute has the same meaning as the "immediate presence" requirement in the robbery statute (§ 211). (*People v. Medina* (1995) 39 Cal.App.4th 643, 650 (*Medina*); *People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1131 ["the Legislature intended the carjacking statute to ' " 'be given a like interpretation' " ' " as the robbery statute].)

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[4] Our standard of review is well-established: "In evaluating a claim regarding the sufficiency of the evidence, we review the record 'in the light most favorable to the judgement below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Westerfield* (2019) 6 Cal.5th 632, 713, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

"The generally accepted definition of immediate presence . . . is that ' "[a] thing is in the [immediate] presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." ' " (*People v. Hayes* (1990) 52 Cal.3d 577, 626–627 (*Hayes*).)

Property may be found to be "in the victim's immediate presence 'even though it is located in another room of the house, or in another building on [the] premises.' " (*Hayes*, *supra*, 52 Cal.3d at p. 627.) For example, in *People v. Johnson* (2015) 60 Cal.4th 966 (*Johnson*), our Supreme Court held the victim, who died prior to the carjacking, was in the "immediate presence" of the vehicle, which was in the garage of her house, even though the victim was found dead, face down in her kitchen. (*Id.* at pp. 990, 973.) The garage was separated from the kitchen by a breezeway, and there was evidence the victim kept her car keys "on a kitchen counter or in her purse or a dish that was on the counter" and therefore evidence the keys were within her reach. (*Id.* at p. 990.)

Defendant maintains *Johnson* "expressly relied on the fact that her car[] keys were within her 'immediate reach' when force was used to take them from her," and points out typically in carjacking cases the keys are in the victim's immediate possession. (*Johnson*, *supra*, 60 Cal.4th at pp. 991–992; *People v. Hoard* (2002) 103 Cal.App.4th 599, 609.) However, while the high court discussed the fact there was evidence the victim's keys were in the kitchen, it considered the overall context—specifically that the victim was "physically close to both [the car and keys], and the jury could have reasonably found she could have retained possession of both had defendant not killed her." (*Johnson,* at p. 991.) So too here. Even though B.L.'s car and keys were both in the garage, she would have had ready access to both and

may have been able to prevent the carjacking had the men not battered and restrained her.

In *People v. Hoard*, *supra,* 103 Cal.App.4th at page 609, the court concluded a victim can be in the "immediate presence" of a car parked outside the place in which the victim is physically present. In that case, the two victims were inside a jewelry store, while their car was in the parking lot. (*Id.* at p. 602.) After the defendant entered the store, he demanded, at gun point, that one of the victims surrender her car keys. (*Ibid.*) The defendant then taped both victims' hands behind their backs and taped their mouths. (*Ibid.)* The court concluded that although the car was in the parking lot, the victims could have retained possession if not for " 'force or fear.' " (*Id.* at pp. 608–609.) Therefore, the vehicle was in their "immediate presence." (*Id.* at p. 609.)

Defendant relies principally on *People v. Coleman* (2007) 146 Cal.App.4th 1363, in which the Court of Appeal reversed a carjacking conviction. There, the owner of a glass shop drove to work in his Silverado pickup truck, parked it at the shop, and then drove off in a company truck. (*Id.* at p. 1366.) Defendant walked into the shop mid-afternoon, asked a question regarding glass repair work, then left. Defendant later returned in dark clothes and a gun just before closing. (*Ibid.*) He demanded that the office manager, who was sitting at her desk, produce the keys to the Silverado. As she walked to the back of the shop to retrieve the keys, defendant followed with the gun to her head. (*Ibid.*) While the Court of Appeal observed the courts have broadly construed the elements of carjacking (*id.* at pp. 1368–1371), it could not "conclude that a carjacking has been committed here, where [the office manager] was not within any physical proximity to the Silverado, the keys she relinquished were not her own, and

there was no evidence that she had ever been or would be a driver of or passenger in the Silverado." (*Id.* at p. 1373.) "These circumstances," said the court, "are simply too far removed from the type of conduct that section 215 was designed to address. . . . To find that [defendant's] actions amounted to a carjacking would be to disregard both the language of section 215 cautioning that the statute must not be construed to supersede the offense of robbery and legislative intent demonstrating that the statute was designed to address the violent nature of vehicle takings committed against drivers and passengers." (*Ibid.*)

In *Johnson*, which we have discussed above, the Supreme Court distinguished *Coleman*, reciting, " '[t]he office manager . . . "was not within any physical proximity to the Silverado, the keys she relinquished were not her own, and there was no evidence that she had ever been or would be a driver of or passenger in the Silverado." ' " (*Johnson, supra,* 60 Cal.4th at p. 991.) The case before it, said the high court, was "very different." "The murder victim owned the keys and the car, she was physically close to both, and the jury could have reasonably found she could have retained possession of both had defendant not killed her." (*Ibid.*) Moreover, "[t]he nature of the taking—entering a private home to obtain car keys inside that home in order to use a car in the garage as a getaway—raised a very serious potential for harm to the victim." (*Id.* at p. 990.) Much the same can be said about the case at hand, and we therefore conclude *Johnson,* is the more apposite authority. (See *People v. Gomez* (2011) 192 Cal.App.4th 609, 624–625, overruled on other grounds by *People v. Elizalde* (2015) 61 Cal.4th 523, 533.)

Force or Fear

Defendant also contends "the application of force or fear was not necessary for [the victim] to lose possession" of the car. This is so, he claims,

because "the keys to the car were in the car, while [the victim] was in the house," and he "could have surreptitiously entered the garage and then the car and, using the keys inside it, driven away with it without confronting [the victim] at all."

Section 215, subdivision (b) was enacted to address "a particularly serious crime that victimizes persons in vulnerable settings and, because of the nature of the taking, raises a serious potential for harm to the victim, the perpetrator and the public at large." (*People v. Antoine* (1996) 48 Cal.App.4th 489, 495). "[T]he victim need not actually be physically present in the vehicle when the confrontation occurs." (*Medina, supra,* 39 Cal.App.4th at p. 650). Rather, he or she must be unable to retain possession of the vehicle because of force or fear. (*Ibid.*)

For example, in *Medina*, there was evidence the victim was lured away from his car into a hotel room. (*Medina*, *supra*, 39 Cal.App.4th at p. 646.) One of the defendant's accomplices handcuffed the victim, took his keys and money, and then tied his feet with a television cord. (*Id.* at pp. 646–647.) The defendant and another accomplice proceeded to hit the victim with sticks. (*Ibid.*) The defendant and the two accomplices then absconded in the victim's car, which was parked outside. (*Id.* at p. 647.) While the confrontation did not take place in or next to the car, the Court of Appeal concluded the victim could have retained possession of the vehicle had his car keys not been forcibly taken. (*Id.* at pp. 651–652.)

Here, it is immaterial that the two men "could" have made their way into the house through the garage and thereafter searched the car and found the keys, themselves. We are concerned with what did occur. And there is abundant evidence that B.L. disclosed the presence of her car in the garage and the location of her keys in it because she was threatened and

manhandled. In fact, she testified she "wasn't sure about whether [she was] going to live," "was scared," and finally pretended to be unconscious.

Whether defendant intended to steal B.L.'s car from the get-go is also immaterial. In *People v. Gomez, supra,* 192 Cal.App.4th 609, for example, the victim was walking to his apartment when four men exited from a car. (*Id.* at p. 614.) They punched him, knocked him down, and threw concrete blocks at his head. (*Ibid.*) During this altercation, the defendant obtained the victim's car keys. (*Ibid.*) No evidence suggested the men, up until then, had intended to take the keys and the car. (*Id.* at p. 622.) The defendant left with the keys, and the victim returned to his apartment. (*Id.* at pp. 614–615) The assailants returned, however, 10-20 minutes later and took the car, which was parked 10 feet away from the victim's apartment building. (*Ibid.*) Not surprisingly, the victim was afraid to intervene and attempt to retain possession of his car. (*Id.* at p. 625.) Even though the victim did not, at that point, possess his keys, the appellate court concluded the car was taken from his immediate possession (*id.* at pp. 618–619), and it was taken through force or fear because the victim was "fearful of a further assault and would have acted to stop [the defendant] and retain possession of his truck if not prevented by such fear." (*Id.* at p. 624.)

Likewise, here, while the men may not have originally known about B.L.'s car, they both forced this information out of her and prevented her from retaining possession of her car through physical intimation and restraint to the point she feared for her life.

In sum, substantial evidence supports the carjacking conviction.

Senate Bill No. 136 (2019–2020 Reg. Sess.)

Defendant also contends, and the Attorney General agrees, Senate Bill No. 136 (2019–2020 Reg. Sess.), which amended section 667.5, subdivision

(b), applies to this case and requires that the enhancements for prison priors be stricken.

Prior to January 1 of this year, section 667.5, subdivision (b) required trial courts to impose a one-year sentence enhancement for prior prison terms. Senate Bill No. 136 (2019–2020 Reg. Sess.) amended that provision, and the statute now limits prior prison term enhancements to sexually violent offenses as defined in Welfare and Instruction Code section 6600, subdivision (b). Accordingly, under *In re Estrada* (1965) 63 Cal.2d 740, 744 (disapproved on another ground as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 222, 230), the courts of appeal have, since January 1, stricken prior prison enhancements for other crimes. (E.g. *People v. Matthews* (2020) 47 Cal.App.5th 857, 865 [four one-year non-sexually violent prior prison term enhancements stricken]; *People v. Smith* (2020) 46 Cal.App.5th 375, 396 [two non-sexually violent prior prison enhancements stricken]; *People v. Cruz* (2020) 46 Cal.App.5th 715, 739 [one non-sexually violent prior prison enhancement stricken]; *People v. Gastelum* (2020) 45 Cal.App.5th 757, 772–773 [one prior non-sexually violent prior prison sentence enhancement stricken].)

Here, the trial court imposed two prior prison term enhancements for offenses not coming within amended section 667.5, subdivision (b) (for possessing a firearm with a prior conviction (§ 12021.1) and possession of a firearm by a felon (§ 12021, subd. (a)(1)). Accordingly, these enhancements must be stricken.

Generally, when part of a sentence is stricken, it is remanded for resentencing. (*People v. Buycks* (2018) 5 Cal.5th 857, 893.) However, where the trial court has imposed the maximum sentence, remanding for resentencing is unnecessary as it does not call for the trial court to exercise

its sentencing discretion. (*People v. Lopez* (2019) 42 Cal.App.5th 337, 342.) Here, the trial court imposed the maximum sentence. Accordingly, remand is unnecessary.

DISPOSITION

The judgment is modified to strike the two prior prison term enhancements imposed under former section 667.5, subdivision (b). As so modified, judgement is affirmed. The trial court is directed to prepare an amended abstract of judgement and forward it to the Department of Corrections and Rehabilitation.

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Banke, J.

We concur:

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Margulies, Acting P.J.

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Sanchez, J.

A156660, *People v. Romero*